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No. 06-1392

IN THE

# Supreme Court of the United States

DONALD GARRETT,

*Petitioner*,

v.

OKLAHOMA PANHANDLE STATE UNIVERSITY,

*Respondent*.

**On Petition for Writ of Certiorari to the Supreme Court of Oklahoma**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* PROFESSOR LUKE MEIER IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

*Amicus Curiae* respectfully requests this Court's leave to file an amicus curiae brief pursuant to Rule 37.2(b) of the Rules of Supreme Court.

*Amicus Curiae* is an Assistant Professor of Law, currently visiting at the University of Nebraska-Lincoln College of Law. *Amicus* supports Petitioner Donald Garrett's Petition for Writ of Certiorari. This case raises important issues under the Full Faith and Credit Clause and Supreme Court precedent which are worthy of this Court's consideration.

Consent to file an *amicus curiae* brief has been given by counsel for Petitioner Donald Garrett, but has been withheld by Respondent Oklahoma Panhandle State University.

Respectfully submitted,

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## BRIEF OF *AMICUS CURIAE* PROFESSOR LUKE MEIER IN SUPPORT OF PETITIONER

## STATEMENT OF INTEREST

*Amicus* is currently a Visiting Assistant Professor of Law at the University of Nebraska College of Law. He has taught and researched in the areas of Constitutional Law, Federal Courts, and Procedure.[1]

[1] The attorneys representing Donald Garrett have consented to the filing of this brief. The attorneys representing Oklahoma Panhandle State University do not consent to this filing. Pursuant to Rule 37.6, *amicus* states that none of the parties nor their counsel wrote this brief in whole or in part. The costs to print, file, and serve this brief were borne by Hughes & Luce LLP, which is the law firm representing Donald Garrett in this litigation. *Amicus* received no monetary contribution to the preparation or

## SUMMARY OF THE ARGUMENT

This case involves the effect a state court must give under the Full Faith and Credit Clause to the judgment of a sister state court. The case is complicated somewhat by the fact that the judgment of the sister state court in this case is against a political subdivision of the State in which enforcement is sought. In *Nevada v. Hall*, 440 U.S. 410 (1979), and *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003), this Court addressed the effect of the Full Faith and Credit Clause in interstate litigation against a state entity. The clear import of *Hall* and *Hyatt* is that neither sovereign immunity nor the Full Faith and Credit Clause preclude a State from suit in a sister State's courts under the sister State's applicable laws. This case gives the Court an opportunity to tackle issues anticipated by the Court, but left unresolved, in those two cases. Specifically, the Court can use this case to clarify whether the Full Faith and Credit Clause applies differently when a collateral attack on a sister state judgment is being asserted by an agent of a sovereign State.

Apart from the difficulties raised because Defendant Oklahoma Panhandle State University ("OPSU") is a state entity, this case also implicates exceedingly intricate questions regarding what types of defenses are "jurisdictional" and thus the proper basis for a collateral attack under standard Full Faith and Credit Clause jurisprudence. Here, OPSU has asserted the defense of capacity to be sued. The caselaw is muddled on whether this defense is "jurisdictional" and thus a proper basis for collateral attack under the Full Faith and Credit Clause. Because the litigation strategy for defendants such as OPSU so often depends on whether their asserted

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submission of this brief apart from the costs associated with printing, filing, and serving this brief, which were paid by Hughes & Luce LLP directly to the printer. The views expressed in this brief are those of *amicus* and do not necessarily reflect the views of either Drake University Law School or the University of Nebraska College of Law.

defense is "jurisdictional," litigants such as OPSU would greatly benefit from a Court opinion discussing how to determine whether a defense is "jurisdictional" for purposes of the Full Faith and Credit Clause.

## ARGUMENT

### I. This Case Implicates the Unresolved Issue Raised by *Hall* and *Hyatt* Regarding Whether the Full Faith and Credit Clause Applies Differently When a State Entity Collaterally Attacks a Sister State Default Judgment

To place the current case into proper context, it is first useful to note the similarities between this litigation and that in *Hall* and *Hyatt*. In *Hall*, California residents brought a tort suit in California state court against the University of Nevada and the State of Nevada for injuries sustained as a result of the alleged careless driving of a Nevada state employee. *See Hall*, 440 U.S. at 411-14. In *Hyatt*, a Nevada resident brought suit in Nevada court against the Franchise Tax Board of California for alleged tortuous conduct by the Franchise Tax Board in attempting to collect a disputed tax assessment. *See Hyatt*, 538 U.S. at 490-91. In this case, a Texas resident brought suit in Texas Court against OPSU for alleged misconduct by the Oklahoma state school in maintaining required statistical information.

In all three suits, the defendant state entity has claimed a defense to liability under the entity State's law. In *Hall*, the Nevada defendants claimed that their liability in the California state court action was limited by Nevada's $25,000 limitation to Nevada's waiver of sovereign immunity. *See Hall*, 440 U.S. at 412-13. In *Hyatt*, the California defendant claimed that its liability was limited by California's complete sovereign immunity for California agencies. *See Hyatt*, 538 U.S. at 491. In the current case, the Oklahoma defendant,

OPSU, claims that its liability is limited by Oklahoma law regarding the capacity of OPSU to be sued.

*Hall* and *Hyatt* are noticeable different from the current litigation, however, in that the state defendants in those cases asserted their defenses in the sister state forum. In both *Hall* and *Hyatt*, the state defendants maintained that the sister State in which the litigation had been filed was required to respect their home-state immunity defense under the Full Faith and Credit Clause. In both cases, this Court rejected the argument. *See Hyatt*, 538 U.S. at 496; *Hall*, 440 U.S. at 424.

In the case before the Court, however, rather than assert its Oklahoma state law defense in the Texas state court proceedings, OPSU has instead waited until Garrett's attempted enforcement of the Texas default judgment in the Oklahoma courts. Then, in the confines of the Defendant's home State, OPSU collaterally asserted their Oklahoma capacity defense to collaterally attack the Texas judgment. Oklahoma state courts accepted the argument and refused to enforce the Texas judgment.

As will be discussed in more detail in the following Section of this brief, a litigant that is not a state entity is only allowed to collaterally attack a sister state court's judgment on "jurisdictional" grounds. Thus, were OPSU not an Oklahoma state entity, its attempt to collaterally attack the Texas default judgment issued in this litigation would depend on whether OPSU's lack of capacity defense is a jurisdictional argument. This is a difficult question in and of itself, as discussed below.

Because OPSU is a state actor, however, it is arguable that the Full Faith and Credit Clause might apply differently to Garrett's attempt to enforce the Texas judgment procured in this case. State courts might have additional sovereignty justifications to resist enforcement of a sister state's judgment against a state entity. This very issue was identified by then-

Justice Rehnquist in his dissenting opinion in *Hall*. Anticipating the inherent difficulties associated with interstate litigation involving state actors when the defendant State is precluded from asserting sovereign immunity defenses in the initial sister state court litigation, Justice Rehnquist mused:

> The problem of enforcement of a judgment against a State creates a host of additional difficulties. Assuming Nevada has no seizable assets in California, can the plaintiff obtain enforcement of California's judgment in Nevada courts? Can Nevada refuse to give the California judgment "full faith and credit" because it is against state policy? Can Nevada challenge the seizure of its assets by California in this Court?

*Hall*, 440 U.S. at 443 (Rehnquist, J., dissenting).

The questions raised by Justice Rehnquist's opinion, and left unanswered by the Court in both *Hall* and *Hyatt*, have come to fruition in the current litigation. The current litigation represents an opportunity to revisit the questions raised by *Hall* and *Hyatt* involving the application of the Full Faith and Credit Clause in litigation involving state actors. Despite Justice Rehnquist's anticipation of this issue almost thirty years ago in *Hall*, the Court has not since devoted attention to this question.

To illustrate the importance of this issue, consider the result in *Hall* had the Nevada defendants whom were sued in California state court used the same litigation strategy as OPSU in this case. In *Hall*, the Nevada defendants asserted their Nevada sovereign immunity claims in the California state courts. But, what if the Nevada defendants had taken the same litigation strategy as OPSU in this case? Instead of arguing in California courts that California was required to, or should as a matter of comity, apply Nevada's sovereign immunity law, the Nevada defendants could have ignored the suit and waited until the California plaintiffs attempted to enforce their California judgment in Nevada state courts.

Then, Nevada could have asserted their sovereign immunity arguments to a receptive audience: a Nevada state court.

As suggested by Justice Rehnquist in *Hall*, perhaps state courts have wider discretion under the Full Faith and Credit Clause to refuse to enforce a sister state judgment when the judgment is against a state actor. Under *Hall*, the California court was not required to give full faith and credit to Nevada's statutory defense. However, would Nevada courts have been required to give full faith and credit to that California judgment if enforcement had been attempted, and resisted, in Nevada state court? Or, if Nevada had simply ignored the initial litigation in the California courts, would its attempt to raise its defense in a Nevada enforcement action be governed by standard Full Faith and Credit Clause jurisprudence, or does the Full Faith and Credit Clause apply differently when an agent of a sovereign state is asserting the collateral attack on a sister court judgment? These issues threaten the essence of this Court's *Hall* and *Hyatt* decisions. By accepting Certiorari in this case, this Court can clarify whether the Full Faith and Credit Clause's usual mandate that a sister state's judgment be enforced is altered when the litigation involves a state actor claiming a defense that could have been raised in the forum State.

## II. Lack of Capacity is Not a "Jurisdictional Issue" Which Permits a State Court to Ignore a Judgment of a Sister State Court

Apart from the complexities raised by the fact that this interstate litigation involves a state actor claiming defenses pursuant to its status as a governmental entity, this litigation also raises important questions regarding the standard Full Faith and Credit Clause analysis for determining when a sister state's judgment must be enforced. This case represents an opportunity for the Court to address the circumstances under which a sister state's judgment might be resisted without violating the Full Faith and Credit Clause.

OPSU's argument that they have no capacity to be sued is on the border line of the type of "jurisdictional" defect that this Court has acknowledged would permit a State to refuse to recognize a sister state court judgment without violating the Full Faith and Credit Clause. The default rule, of course, is that judgments of a sister state court must usually be enforced: "This Court has consistently recognized that, in order to fulfill this constitutional mandate, 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.'" *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Ass'n.*, 455 U.S. 691, 704 (1982) (quoting *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C.J.)). As a corollary to this rule, however, this Court has also explained that "a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits-had jurisdiction, that is, to render the judgment." *Id.*

The Oklahoma state courts refused to enforce the Texas state judgment procured in this case. For this holding to have legitimacy under the analysis prescribed by this Court under the Full Faith and Credit Clause, it must be demonstrated that OPSU's lack of capacity to be sued is a jurisdictional defect allowing Oklahoma to ignore the Texas judgment without violating the Full Faith and Credit Clause. This legal proposition, however, is far from clear, as courts have split over whether lack of capacity implicates the jurisdiction of a court.

There are two general types of jurisdictional issues: subject matter jurisdiction and personal jurisdiction. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999). Subject matter jurisdiction addresses the power of the court over the subject matter of the lawsuit. *See id.* Subject matter jurisdiction cannot be waived by the litigants. *See id.* There is conflicting authority regarding whether lack of capacity

implicates the subject matter jurisdiction of a court and can thus be asserted at any point in the litigation. *See, e.g., Bowers v. Du Page County Board of School Trustees,* 539 N.E.2d 246, 250 (Ill. App. 1989) ("Thus, the legal existence of the entity being sued may be brought into question at any time."); *Oliver v. Swiss Club Tell*, 222 Cal.App.2d 528, 537-38 (Cal. App. 1963) ("Where a suit is brought against an entity which is legally nonexistent, the proceeding is void *ab initio* and its invalidity can be called to the attention of the court at any stage of the proceeding. . . . Accordingly, it is a corollary to this rule that the objection that a plaintiff or defendant is nonexistent is not subject to waiver, as in the case of misnomer or lack of legal capacity, because the defect is jurisdictional."); 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1559 n.19 (2d. ed. 1990) (discussing and listing other cases in which lack of capacity was treated as a subject matter jurisdiction defect); 59 Am. Jur. 2d *Parties* § 362 (2007) (explaining that defense of lack of capacity to be sued is jurisdictional and cannot be waived).

The weight of authority, however, holds that lack of capacity is not a subject matter jurisdiction issue. *See, e.g., Summers v. Interstate Tractor & Equp. Co.*, 466 F.2d 42 (9th Cir. 1972) ("The question of a litigant's capacity or right to sue or to be sued generally does not affect the subject matter jurisdiction of the district court."); *Crane Const. Co. v. Klaus Masonry*, 71 F.Supp.2d 1138, 1141 (D.Kan. 1999) ("Consequently, under federal law, legal existence is not a jurisdictional issue . . . ."). Because lack of capacity can be waived in many jurisdictions, including Texas, *see Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 56 (Tex. 2003), and Oklahoma, *see Bailey v. Campbell*, 862 P.2d 461, 466 (1992),[2] it

[2] Thus, it seems, had Garrett filed suit in Oklahoma state court and executed service in the same manner as was done in this litigation, OPSU would be precluded from resisting a judgment against them had they not

follows that in these jurisdictions capacity is not the type of jurisdictional defect which implicates the power of the court over the subject matter of the lawsuit:

> It is difficult to reconcile the conception of capacity as a jurisdictional matter with [the federal procedural] requirement that capacity be put into issue by specific negative averment, which indicates the draftsmen's intention that the issue be excluded from the case unless expressly raised by a party at the pleading state. This is in sharp contrast to the strong and clearly expressed policy against the waiver of subject matter jurisdiction defects.

6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1559 (2d. ed. 1990)

It is also unclear whether a lack of capacity defense implicates the *personal* jurisdiction of a court and is thus a proper basis under the Full Faith and Credit Clause for a collateral attack on a state judgment. *See, e.g., Underwriters Nat'l Assur., Co.*, 455 U.S. at 711 ("Alternatively, respondents argue that the judgment of the Rehabilitation Court was not entitled to full faith and credit because that court lacked in personam jurisdiction over the North Carolina policyowners and the state officials. Although under different circumstances these questions might give us pause, it is clear that the Rehabilitation Court had personal jurisdictions over all parties . . . ."). Personal jurisdiction deals not with the power of the court over the subject matter of the lawsuit, but rather with the Due Process Clause limitations on the power of the court over the persons or property involved in the lawsuit.

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properly raised the capacity defense before the Oklahoma trial court. That Oklahoma courts have accepted the tardy capacity defense to this Texas state court judgment, when the defense would be rejected if the initial judgment was under Oklahoma law, highlights the egregiousness of the Full Faith and Credit violation by the Oklahoma state courts in this litigation.

*See Ruhrgas AG*, 526 U.S. at 583-84. Analysis of whether a court has personal jurisdiction over a person is analyzed under the now-familiar notions of "minimum contacts" and "traditional notions of fair play and substantial justice." See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067 (2d. ed. 1990). Personal jurisdiction, like capacity to be sued, can be waived. Therefore, that many jurisdictions treat capacity as a defense that can be waived does not necessarily mean that the issue is not a "jurisdictional" issue, relating to the "power" of the state court, which permits a state court to ignore a sister court's judgment without violating the Full Faith and Credit Clause. Again, here, the authorities are scarce and less than clear. *See, e.g.*, 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1559 (2d. ed. 1990) (stating that a lack of capacity defense is "somewhat analogous to lack of personal jurisdiction").

Ambiguity in this area is particularly problematic for litigants such as OPSU who must decide whether to appear in the foreign litigation to assert their presumed jurisdictional challenge. Had OPSU asserted its lack of capacity defense in the Texas court litigation, it would have been foreclosed under principles of res judicata from reasserting them in the subsequent litigation in Oklahoma courts to enforce the Texas judgment (assuming Garrett had won on the merits). *See Durfee v. Duke*, 375 U.S. 106, 111 (1963) ("[A] judgment is entitled to full faith and credit--even as to questions of jurisdiction--when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."). On the other hand, if a litigant in OPSU's position ignores the out of state litigation, takes a default judgment, and collaterally attacks the jurisdiction of the initial court, it foregoes the ability to litigate the underlying merits of the litigation should it lose on the alleged jurisdictional defense. *See Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)

("If, in the absence of an appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the [personal jurisdiction] issue in the present action."); 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4430 (2d. ed. 2002) ("[U]nsuccessful submission of the question by motion to vacate a default judgment should have the same preclusion effects as submission before judgment."). This is a difficult choice for the defendant even when it is clear that the defendant has a defense which is jurisdictional in nature and thus a legitimate basis for a collateral attack on a default judgment. *See* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4430 (2d. ed. 2002) ("[A] substantial burden can be imposed on a defendant merely by initiating suit in a court that has at least a tenuous basis for asserting [personal] jurisdiction. Litigation of the question in a distant forum may prove onerous. There is a substantial risk, further, that the initial court cannot be trusted to measure its own power with the same disinterested detachment as a later court. Submission of the matter for a binding determination may prove an unattractive prospect. The alternative prospect of default, however, forfeits the opportunity to defend on the merits should the assertion of jurisdiction be upheld."). When, however, a defendant's claim is one, such as a lack of capacity defense, which is only arguably a jurisdictional claim, the litigation choice for the defendant becomes even more difficult. If a defendant such as OPSU takes a default judgment but is wrong about the jurisdictional nature of their defense, they will be precluded in the subsequent enforcement litigation not only from arguing the merits of the lawsuit but also from asserting the defense which they incorrectly presumed to be jurisdictional.

It is not clear that OPSU understood the tenuous position they were in when they neglected to challenge capacity in the Texas litigation. A diligent litigant, however, would benefit from a Supreme Court decision discussing what types of

issues constitute "jurisdictional" claims that can be the basis of a collateral attack on a judgment consistent with the Full Faith and Credit Clause. This issue will most obviously arise under facts similar to *Hall* and *Hyatt*, in which the collateral attack is based on a state entity's sovereign immunity claim. *Cf. Idaho v. Coeur d'Alene,* 521 U.S. 261, 267 (1997) (stating that the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"). Clarification on this issue would at least allow defendants to make informed decisions as to when they can forego litigation in a foreign jurisdiction without waiving their defense.

## CONCLUSION

Respectfully, for the reasons stated above and for those articulated in Petitioner's brief, the Writ of Certiorari should be granted.

Respectfully submitted,

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